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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	)	CS Docket No. 96-60
	)	
Leased Commercial Access	)	

COMMENTS OF VALUEVISION INTERNATIONAL, INC.

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May 15, 1996

Summary

ValueVision strongly endorses the Commission's proposed cost/market formula as a means of making leased access the "genuine outlet for programmers" that Congress intended it to be,[1] with appropriate safeguards, including those set forth in the Notice of Proposed Rulemaking.[2] We respectfully urge that the Commission honor its announced commitment to reach a final decision in this matter as "expeditiously as possible." Notice ¶ 13.

ValueVision supports the Commission's proposed presumption against the designation of channels other than those channels with the lowest opportunity costs. We likewise endorse the Commission's proposal that subscriber revenue be used as a proxy for operating costs, a measure that would further the congressional goal of "increasing certainty"[3] in the leased access rate-setting process. Similarly, we urge the Commission to clarify which opportunity costs are sufficiently quantifiable to include in the cost formula rate calculation.

ValueVision also urges the Commission to ensure that leased access programmers do not have relationships with cable operators that undermine the congressional mandate that

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[1] S. Rep. No. 92, 102d Cong., 1st Sess. 79 (1991) ("Senate Report").

[2] Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-122 (released Mar. 29, 1996) ("Notice").

[3] See Senate Report, at 32.

programmers selected for leased access be <u>unaffiliated</u> with the cable operator. We propose that the Commission define "affiliate" in the leased access context to include any financial or business relationships between a cable operator and a cable programmer that result in the potential ability of the cable operator to control or influence the programmer's business affairs.

ValueVision proposes several leased access request procedures. We urge the Commission to promulgate rules that (a) mandate the timely provision of sufficient rate information to prospective customers for them to make an informed decision; (b) require the provision of channel capacity for leased access on a first-come-first-served basis; and (c) govern leased access negotiations.

ValueVision believes that implementation of the cost/market formula with such regulatory safeguards would fulfill the Commission's statutory mandate for leased access. <u>Allowing a transition period of the sort that the Notice suggests, however, would be arbitrary, capricious, and directly contrary to the language and purpose of the 1992 Cable Act.</u> Particularly in light of past delays, the continued use of the discredited implicit fee formula for any length of time would disserve the public interest, would perpetuate the injury to unaffiliated programmers, and would not serve any legitimate reliance interests. We therefore urge the Commission to implement the proposed cost/market formula promptly.

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To: The Commission

COMMENTS OF VALUEVISION INTERNATIONAL, INC.

ValueVision International, Inc. ("ValueVision") respectfully submits these comments in response to the Notice of Proposed Rulemaking ("Notice")[1] in the above-captioned proceeding.

I. THE NOTICE CORRECTLY POINTS OUT THAT THE HIGHEST IMPLICIT FEE FORMULA HAS NOT BEEN CONSISTENT WITH THE STATUTORY GOAL AND SUBSTANTIALLY OVERPRICES LEASED ACCESS.

The evidence supporting the Commission's tentative conclusion "that the highest implicit fee formula is likely to overcompensate cable operators and does not sufficiently promote the goals underlying the leased access provisions" (Notice ¶ 29) is overwhelming. The implicit fee formula was not proposed by the Commission but was founded on the erroneous assumption in an economic study, provided by cable operators, that programmers

[1] FCC 96-122 (released Mar. 29, 1996).

receive rather than pay money for carriage.[2] In fact, many programmers pay operators for the right to air their programming, or at least charge nothing for it.[3] Thus, as the Commission recognizes, the highest implicit fee formula is not based on reasonable costs that cable operators incur in carrying leased access programming. See Notice ¶ 31.

Indeed, that formula permits cable operators to exact a double recovery. See id. ¶ 29. Where the lowest license fee paid to a programmer in a particular programming category is zero, the implicit fee for that category allows an operator to collect once from the subscriber and then again from the programmer. For tiered channels, that formula charges the programmer even more, by assuming that each channel on a tier generates identical revenues regardless of its popularity.

Finally, since it is based on the channel with the highest markup over programming costs, the highest implicit fee formula requires a leased access programmer to pay more than the operator charges to programmers providing similar programming. Id. ¶ 30. This is just the sort of anticompetitive restriction

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[2] Petition for Reconsideration, MM Docket 92-266, at 4 (June 21, 1993) ("Petition"); see Stanley M. Besen, Analysis of Cable Television Rate Regulation, Attachment to Comments of Tele-Communications, Inc. at 54 n.50 ("Besen Study") (stating that "[t]he implicit access fee is the amount the cable operator retains from the carriage of a program service after making all required payments to the programmer" (emphasis added)).

[3] See, e.g., Richard Katz, Two Launches in Contrast: TV Land and Ovation, Multichannel News, Apr. 29, 1996, at 66.

on access that Congress sought to prevent in the 1992 Cable Act.[4/] As ValueVision has previously demonstrated, pursuant to the highest implicit fee formula, two major cable operators have quoted rates to ValueVision as their programming competitor that are six to eleven times the rates that they charge their own affiliates, QVC and HSN.[5/]

II. THE COMMISSION SHOULD ADOPT APPROPRIATE SAFEGUARDS TO INCREASE CERTAINTY AND PROTECT LEASED ACCESS PROGRAMMERS IN THE APPLICATION OF THE COST/MARKET FORMULA.

ValueVision believes that the cost/market formula generally ensures that the operator is not deprived of revenue by providing leased access channels, but it urges the Commission to facilitate the uniform industry-wide implementation of the formula. As we have previously documented, cable operators have employed a wide variety of interpretations of the leased access rules that have limited the opportunities of unaffiliated

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[4/] See also Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445, 2466 (1994); see also id. at 2474 (Stevens, J., concurring) ("[i]t is . . . clear that cable operators -- particularly (but not exclusively) those affiliated with cable programmers -- have both the ability and the economic incentive to exploit their gatekeeper status").

[5/] Comcast Corporation ("Comcast") and Tele-Communications, Inc. ("TCI") respectively own 57.45% and 42.55% of QVC. Comcast SEC Form 10-K at 3 (Mar. 1, 1996). TCI controls HSN. See Ex Parte Presentation of ValueVision, MM Docket No. 92-266 (May 16, 1995) (calculating that QVC pays approximately $.12 per subscriber per month for carriage and HSN pays only about $.07 per subscriber per month); see also Ex Parte Presentation of ValueVision, MM Docket No. 92-266 (May 3, 1995).

programmers seeking to gain access.[6] In light of these experiences, and to satisfy the mandate of the 1992 Cable Act to eliminate the uncertainty surrounding leased access that prevented its widespread use, Valuevision urges the Commission to adopt the safeguards set forth below.

A. Channel designation

The Notice seeks comment on methods by which the Commission can restrict an operator's ability to manipulate its designation of channels under the proposed formula in order to maximize leased access rates. Notice ¶ 76. An economically rational cable operator is likely to bump channels with the lowest opportunity costs. See id. ¶ 89. ValueVision also believes that the channels that the cable operator designates for purposes of calculating the cost formula should generally be the ones that the operator actually bumps for leased access

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[6] ValueVision wrote to the largest 99 MSOs in April and May 1993, asking for their commercial leased access rates and requesting consideration for leased access carriage. Nearly seventy MSOs failed to respond at all. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Reply Comments of ValueVision International, Inc., CS Docket 94-48, 7 (July 29, 1994). Of those that did, some responded by asking for burdensome additional information, demanding a non-refundable deposit before they would provide such rates, or stating that they had neither the time nor the inclination to comply with ValueVision's request. Id. at 8 n.17. In response to similar letters sent after the Commission's first leased access rate regulations were published, some MSOs actually suggested that rate negotiation should be deferred until the Commission finished reviewing its leased access rules. Still others refused to provide such rates until ValueVision provided further information on its products and financial affairs. Id. 8-9.

providers.[7] Otherwise, the operator could generate artificially high rates by passing along opportunity costs associated with channels that have not in fact been lost. We therefore strongly endorse the Commission's proposed presumption against an operator's designating or bumping channels other than its lowest opportunity cost channels. Id. ¶ 76.

The Commission has also tentatively concluded that operators may redesignate their unused leased access capacity and recalculate their maximum rates annually. Id. ¶¶ 100-01. In this context, we agree that the Commission should include express prohibitions on the redesignation of channels in "an attempt to inflate the maximum rate in contravention of the purposes of" the Commission's rules and the statute. See id.

B. Calculation of operating costs

ValueVision agrees with the Commission's conclusion that revenue from subscribers more than pays for system operating costs. See id. ¶ 77. The Commission cites cost-of-service rate regulation filings for high cost systems previously made with the Commission, to explain that while such systems generally average about $.46 per channel per subscriber per month in operating costs, the corresponding average revenue from subscribers is approximately $.53. Id. ¶ 77 n.115. We urge the Commission to adopt its tentative conclusion that subscriber revenue should be

[7] As the Commission suggests (Notice ¶ 76), no affiliated programmers should be used as the basis for calculating the maximum rate, as the costs of such programming are not arm's length prices and are subject to manipulation. We address below the definition of affiliates.

used as a proxy for the operating costs of tiered and premium channels for purposes of the cost formula. Id. ¶¶ 77-78. That is, the Commission should clarify that cable operators are required to set operating costs for tiered channels at no more than the amount of subscriber revenue per channel, when calculating maximum leased access rates. And, for premium channels, operating costs should be set at net subscriber revenue. Accordingly, we urge the Commission to clarify that it includes operating costs in the cost formula for tiered channels only for purposes of averaging tiered and premium channel costs.[8]

C. Calculation of opportunity costs

The Commission proposes to allow an operator to deduct "reasonably quantifiable costs . . . associated with carrying the leased access programming." Id. ¶ 79. ValueVision urges the Commission to adopt several clarifications as to which costs qualify as reasonably quantifiable.

First, ValueVision urges the Commission to adopt its tentative conclusion that subscriber revenues allegedly lost as the result of replacing existing programming with leased access programming are not "reasonably quantifiable costs." See id. ¶ 86. We believe that the bumping of least profitable channels in favor of leased access programmers will not result in any

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[8] As the Commission explains, "[b]ecause the operator may select designated channels from the BST, any CPST, or premium services . . . corresponding per channel costs will vary depending on the number of subscribers that receive each service." Id. at ¶ 90.

reasonably quantifiable costs due to changes in subscriber penetration, and that the need for certainty in leased access rates emphasized by Congress in the 1992 Cable Act strongly counsels against acceptance of such inherently speculative claims by cable operators.[9/]

This "predictive judgment"[10/] has ample support. As the legislative history of the 1992 Cable Act makes clear, cable subscribers spend roughly two-thirds of their viewing hours watching broadcast stations.[11/] With the exception of NFL football, Congress concluded that "the least popular local television signal is watched on cable systems by as many people as watch the most popular cable network."[12/] Recent data confirm that a large number of cable channels have virtually no audience.[13/]

9/ As the Commission notes, in the premium context, any "subscriber loss is included by allowing the operator to include an amount in the proposed cost formula equal to the total subscriber revenue for the bumped channel." Notice at ¶ 86.

10/ <u>See</u> <u>Federal Communications Commission v. National Citizens Committee for Broadcasting</u>, 436 U.S. 775, 808-09 (1978).

11/ <u>See</u>, <u>e.g.</u>, Senate Report, at 35 (affirming that [b]roadcast signals . . . remain the most popular programming carried on cable systems, and concluding "that a very substantial portion of the fees which consumers pay to cable systems is attributable to the value they receive from watching broadcast signals").

12/ H.R. Rep. No. 628, 102d Cong., 2d Sess. 53 n.59 (1992).

13/ <u>See</u>, <u>e.g.</u>, Richard Katz, <u>Cable Ratings Continued to Soar in 1Q</u>, Multichannel News, April 1, 1996, at 16. Basic cable channels E!, Headline News, Nostalgia, TV Food, VH1, and Court TV had Nielsen prime time ratings of only 0.3 or less in the first quarter of 1996, which represented *no* appreciable increase in the number of viewers from the same quarter last year. <u>Id.</u>

Moreover, attempts to quantify alleged losses in subscriber revenue resulting from the carriage of leased access programming would create opportunities for abuse that would thwart the ability of unaffiliated programmers to obtain carriage.[14] Indeed, allowing operators to allege such losses as a defense would force the programmer in every case to provide evidence attempting to predict the viewing preferences of a cable system's subscribers, and thereby frustrate the congressional goal of "increasing certainty" regarding leased access terms and conditions.[15]

Second, the Commission makes clear that an operator must deduct any program license fees avoided by carrying leased access programming in calculating its net opportunity costs. Notice ¶ 83. We believe that operators have the ability and incentive to influence the license fees paid for non-leased access programming artificially, even for unaffiliated programming,[16] to inflate their opportunity costs. See id.

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[14] As the Commission notes, pursuant to its going-forward methodology, cable operators may actually be able to increase subscriber revenues if they add new channels to their basic programming tiers in order to carry leased access programming. Notice ¶ 85. Substituting leased access programming for non-leased access programming on the same tier would not affect subscriber rates. See 47 C.F.R. § 76.922.

[15] See Senate Report, at 31-32 (stating that "[b]y involving the FCC before leases are negotiated, programmers will know the parameters of an agreement, increasing certainty and the use of these channels").

[16] As noted above, opportunity cost calculations based upon affiliated programming are inherently unreliable in any event.

This is particularly true with respect to larger MSOs whose bargaining power with programmers is the result of the need of the programmer to obtain nationwide coverage.[17] To account for this possibility, ValueVision urges the Commission to conclude that an operator's substantial deviations from contractual arrangements with non-leased access programmers established prior to the adoption date of the Notice will not be cognizable under the formula.

III. "AFFILIATE" MUST BE DEFINED BROADLY TO ENSURE THAT CABLE OPERATORS FULFILL THEIR SET-ASIDE REQUIREMENT WITH GENUINELY UNAFFILIATED PROGRAMMERS.

The statutory leased access provisions require operators to "designate channel capacity for commercial use by persons unaffiliated with the operator." 47 U.S.C. § 532(b) (emphasis added). For purposes of Title VI, the Communications Act defines an "affiliate" of an entity as another entity that "owns or controls, is owned or controlled by, or is under common ownership or control with, such" entity. 47 U.S.C. § 522. The Commission has suggested elsewhere that it "will address the definition of 'affiliate' in the Title VI context . . . in the 'Cable Reform' rulemaking proceeding" to be instituted shortly.[18] If the Commission does not define "affiliate" carefully, however, operators may evade their statutory leased

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[17] See Horizontal and Vertical Ownership Limits, 8 FCC Rcd 8565, 8571-72 (1993), recon. 10 FCC Rcd 7364 (1995).

[18] Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems, Report and Order and Notice of Proposed Rulemaking, CS Docket Nos. 96-46 & 87-266, ¶ 9 n.28 (released Mar. 11, 1996) ("OVS Notice").

access obligations by funding or supporting new programming entities primarily designed to displace leased access competitors or to outbid them.

To prevent this evasion of leased access obligations, ValueVision urges the Commission to define "affiliate" in this proceeding to include any financial or business relationships, by contract or otherwise, directly or indirectly, between the cable operator and a cable programmer, which result in the potential ability of the cable operator to control or influence the programmer's business affairs. However, neither the lessor-lessee relationship nor a business relationship pursuant to a standard affiliation agreement between a programmer and a cable operator should, by itself, establish an affiliation.

In its rule governing the provision of lines outside a carrier's exchange telephone service area, the Commission defined "affiliate" similarly, to include "any financial or business relationship whatsoever by contract or otherwise, directly or indirectly between the carrier and the customer, except only the carrier-user relationship." See 47 C.F.R. § 63.08(e). In that context, the Commission noted that

> [e]xamples of situations in which a carrier and its customer [would] be deemed to be controlled or having a relationship include the following, among others: Where one is the debtor or creditor of the other (except with respect to charges for communications services); where they have a common officer, director, or other employee at the management level; where there is any element of ownership or other financial interest by one in the other; and where any party has a financial interest in both.

Id., Note to Paragraph (e).

Several cable operators have suggested that the Commission adopt the definition of "affiliate" set forth in that rule in the context of the nondiscrimination rules for operators of OVS. These cable operators point to relationships local exchange carriers established with various video programmers that had the effect of chilling competition on the carriers' video dialtone platforms.[19]

In considering the range of financial or business relationships that should create an affiliation, the Commission could look to the variety of contexts in which it has recognized that non-equity interests may create affiliate and other control relationships. In its ongoing review of broadcast ownership attribution rules, for example, the Commission has considered the potential for non-equity financial relationships and multiple business relationships to create "diversity and competition concerns warranting regulatory oversight." Review of the Commission's Regulations Governing Attribution of Broadcast Interests, 10 FCC Rcd 3606, 3649 (1995). In particular, the Commission has recognized the potential for debt, nonvoting equity, and managerial or other service relationships to influence a licensee's operations. Id. at 3649-53. ValueVision

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[19] Comments of Tele-Communications, Inc., CS Docket No. 96-46, at 7-9 (Apr. 1, 1996); Joint Comments of Cablevision Sys. Corp. and the California Cable Television Assoc., CS Docket No. 96-46, at 12-14 (Apr. 1, 1996); see also Comments of Rainbow Programming Holdings, Inc., CS Docket No. 96-46, at 7-10 (Apr. 1, 1996).

urges the Commission to protect the integrity of its leased access rules by recognizing these principles here.

IV. THE COMMISSION SHOULD ADOPT PROCEDURAL RULES TO FACILITATE THE PROVISION OF LEASED ACCESS WITHOUT ABUSE OR DELAY BY CABLE OPERATORS.

As Congress found in the 1992 Cable Act,[20/] and as the Supreme Court recognized in Turner,[21/] operators have the ability and incentive to obstruct access by competing programmers. Accordingly, ValueVision urges the Commission to adopt rules to ensure that the procedures for requesting leased access do not present opportunities for abuse or delay. We suggest that such rules include the following procedures, designed to make leased access a "genuine outlet" for unaffiliated programmers and to promote the kind of "certainty" about leased access requirements that Congress intended in enacting the 1992 Cable Act. See supra at 13 & n.18.

A. Rate information

Programmers requesting information on leased access rates are entitled to information sufficient to assess whether the quoted rates comply with the Commission's new rules. Such information should include, at a minimum, a specification by the cable operator of the channels to be bumped and, for each such channel, the number of current subscribers, a certified statement of the advertising revenue attributable to the channel, and a

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20/ Senate Report, at 30-32.

21/ See Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. at 2466; see also id. at 2474 (Stevens, J., concurring).

statement of any commissions or payments received or paid by the programmer on that channel. Since the operator will already need to collect this information in order to calculate its rates under the new rules, providing it to the programmer on request would be a minimal burden.[22]

On reconsideration, the Commission declined to require cable operators to make the contracts underlying their leased access rates public. Notice ¶ 60. In contrast, in the OVS rulemaking, the Commission tentatively concluded that OVS operators should make their contracts with video programming providers public, disclosing rates and other terms and conditions of carriage. See OVS Notice ¶ 34. Cable operators have been outspoken advocates of publicly filing such rates.[23] No different rule should apply under Title VI.

B. Selection of programmers

Until the operator has fulfilled its set-aside requirement, it should provide channel capacity for leased access on a first-come-first-served basis. This is the approach the Commission adopted with its original leased access rules in

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[22] This information should be provided to the programmer together with the rates, which the Commission requires to be provided within seven business days. Notice ¶ 40.

[23] See Comments of Tele-Communications, Inc., CS Docket No. 96-46, at 14 (Apr. 1, 1996); see also, e.g., Reply Comments of the National Cable Television Assoc., Inc., CS Docket No. 96-46, at 16-19 (Apr. 11, 1996).

1972,[24] and it is fundamentally sound. As reported in the Notice, ValueVision believes that "without this scheme, cable operators will impermissibly look to content as a means of allocating scarce leased access capacity." Notice ¶ 127. The operator also should not be permitted to defeat carriage by claiming later that a market situation exists, if a programmer requested leased access carriage before the set-aside was satisfied.

C. Negotiations

ValueVision urges the Commission to adopt appropriate regulations to ensure that operators cannot obstruct the negotiation process to prevent particular programmers from availing themselves of leased access. For instance, an operator's market negotiations with competing applicants might reasonably be capped at one week. Seven days is a reasonable length of time in which to complete such relatively simple negotiations, among what will likely be a small number of prospective applicants.[25] Moreover, we suggest that the Commission adopt a rebuttable presumption of carriage for the bidder that agrees to pay the highest rates. Pursuant to such a

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[24] Cable Television Report and Order, 36 F.C.C.2d 141, 241, recon., 36 F.C.C.2d 326 (1972), aff'd sub nom. American Civil Liberties Union v. FCC, 523 F.2d 1344 (9th Cir. 1975).

[25] See Ex Parte Presentation of ValueVision, MM Docket No. 92-266 (Mar. 13, 1996) (containing one-page carriage agreements that ValueVision has negotiated with cable operators). If truly necessary, negotiations regarding additional terms could continue through the period during which the operator is notifying its subscribers of the channel change.

presumption, the highest bidder should, at a minimum, have the right to match the terms of the selected bidder. These procedures would ensure that the operator recovers its opportunity costs, while reducing the opportunity to select a programmer for anticompetitive reasons.

To allow leased access programmers to monitor the operator's compliance with regulatory requirements, ValueVision proposes that the Commission require the operator promptly to notify those who are refused leased access as to the identities of those who are granted access, the monthly rates that they have agreed to pay, and the duration of their leases. If programmers granted carriage are later dropped for nonpayment or other reasons, operators should promptly notify prior leased access bidders and allow them the first opportunity for carriage.

Finally, as with must carry, the Commission should require cable operators to carry each leased access applicant within sixty days of confirmation that the applicant has accepted the rates previously quoted, or (in the case of market negotiation) within sixty days after the selection of the winning bidder.[26/] Such a rule would comport with the Commission's customer service regulations, which require operators to notify customers concerning change of channels within 30 days. See 47

[26/] Cf. Fouce Amusement Enterprises, Inc., 10 FCC Rcd 668 (CSB 1995) (ordering carriage within 30 days of release date of order): WTKK TV, Inc., 10 FCC Rcd 2732 (CSB 1995) (45 days); Cablevision Systems Corp., DA 95-2420 (CSB released Feb. 21, 1996) (60 days).

C.F.R. § 76.309(c)(3)(i)(B). Any disputes over non-price terms can and should be resolved after carriage is effected.

V. THE ADDITION OF A FURTHER TRANSITION PERIOD WOULD BE ARBITRARY, CAPRICIOUS, AND INCONSISTENT WITH THE COMMISSION'S STATUTORY MANDATE.

The Commission has suggested that it may grant "transition relief" with respect to cable systems where operators would need to bump an existing channel in order to accommodate a leased access request. In an appendix to the Notice, the Commission provides an example of a three-year phase-in approach. As cable associations themselves have recognized in the context of the Commission's OVS proceeding, "3 years is an eternity to wait for the opportunity to obtain carriage."[27] Granting a transition period would be arbitrary, capricious, and contrary to the Commission's statutory mandate.

Congress directed the Commission to discharge its responsibility to make leased access a genuine outlet for programmers by April 1993. See 47 U.S.C. § 532(c)(4)(B). The 1992 Cable Act did not provide for a transition period, and the Commission did not provide for one when it adopted its initial

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[27] Reply Comments of American Cable Entertainment et al., CS Docket No. 96-46, 15-17 (Apr. 11, 1996) (arguing, on behalf of several cable groups including nine different state cable television associations, that the Commission must not allow initial OVS channel allocations to be frozen for a period of time). Moreover, in its Order of March 6, 1996, with respect to ValueVision's motion for a writ of mandamus, the Court relied upon the Commission's "representation that it expects to resolve the issue at its March 21 meeting," so "the delay is not 'so egregious as to warrant mandamus.'" In re ValueVision International, Inc., No. 95-1564 (D.C. Cir. Mar. 6, 1996) (citation omitted). The Court surely would regard years of further delay as egregious.

leased access rules. Nor did Congress or the Commission adopt a phase-in period for must carry,[28] another requirement that was alleged to require displacement of existing cable programmers.[29]

At any rate, there has already been a six-year transition period since the Commission's 1990 report to Congress urging "prompt modification" to the 1984 leased access provisions,[30] and a three-year transition period since the Commission produced its now concededly inadequate response. During this time, unaffiliated programmers have been substantially injured and competition has been disrupted. As ValueVision has previously reported to the Commission, the 1993 rules capping leased access rates actually led to rate increases of between 600% and 1100%, compared to the charges before implementation of the rules.[31] Moreover, ValueVision has

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[28] See Implementation of the Cable Television Consumer Protection Act of 1992, Order, 8 FCC Rcd 3938 (1993) (denying NCTA stay petition).

[29] When implementing the 1992 Cable Act, the Commission also did not phase in the reduction in cable rates, despite the economic injury the regulations imposed on cable operators. As one industry analyst has aptly noted, there is even less justification for a transition period in the instant case than there was in that case, since here cable operators are able to recover their opportunity costs. See Mark A. Riely, Media Group Research, Industry Report: Commercial Leased Access to Change Cable Landscape 9 (Apr. 5, 1996) (Attachment A).

[30] See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd 4962, 5046-51 (1990).

[31] Prior to the adoption of the FCC's initial rules, ValueVision had negotiated leased access agreements with TCI and other cable operators at rates that averaged $.08 per subscriber per month. Supplement to Petition for Reconsideration, MM Docket (continued...)

actually lost access to some 900,000 TCI subscribers alone because of its inability to pay these exorbitant rates that its vertically integrated competitors are not required to pay.

Other programmers have shared ValueVision's inability to obtain reasonable carriage agreements under the 1993 rules. For example, Telemiami, a Spanish and Portuguese language programmer in Miami, experienced exorbitant leased access rate increases that the Commission found to "raise[] a substantial possibility of termination of Telemiami's programming service."[32] Low power television stations, which often provide highly localized programming unavailable on other stations, have been quoted rates of over a half million dollars a year for only five to seven hours a day of programming.[33] Another local programmer ceased production after being charged exorbitant rates by a cable operator, which asserted that leased access rate regulations had been "stayed" by the Commission and thus that

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[31] (...continued)
92-266 (Nov. 23, 1993). Following the adoption of the rules, these quoted rates now average over $.74 per subscriber per month. Ex Parte Presentation of ValueVision, MM Docket No. 92-266 (May 3, 1995). Cable operators have consistently justified these substantial rate hikes by relying on the "current FCC rate formula." See, e.g., id.; Ex Parte Presentation of ValueVision, MM Docket No. 92-266 (Apr. 26, 1995) (including letters from cable operators to this effect).

[32] United Broadcasting Corp., 9 FCC Rcd 3651, 3652 (CSB 1994).

[33] Ex Parte Statement of the Community Broadcasters Association (June 19, 1995); see also Letter of Philip R. DeSano (Mar. 7, 1995); Letter from Hugh Boyd (May 3, 1995) (MM Docket No. 92-266).

cable operators "could charge what they pleased."[34/] A Long Island programmer has been quoted prohibitive rates of over $7.3 million per year.[35/] Forcing these programmers to endure a further transition period while the Commission gradually adjusts its leased access scheme would, in the words of one industry expert, have "the fairly obvious practical effect of . . . shutting down leased access almost entirely for the duration of the transition period."[36/]

The Commission suggests that a transition to the new formula might "avoid unduly penalizing operators and programmers." Notice ¶ 99. Such a transition period would protect existing cable programmers -- many of whom are affiliates of cable operators[37/] -- only at the price of perpetuating the injuries that ValueVision and other unaffiliated programmers have suffered under the highest implicit fee formula. Ironically, it would favor cable programmers that are a creation of the

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34/ Letter from Highlands County Board of County Commissioners (Oct. 25, 1994) (MM Docket No. 92-266).

35/ Ex Parte Presentation of KMR Media, Inc., MM Docket No. 92-266 (Nov. 2, 1994).

36/ Riely, at 9.

37/ As only one recent example, see the March 13, 1996, ex parte letter to the Chairman of the Commission by Faith & Values Channel, filed in MM Docket No. 92-266. That letter expressed "deep concern" about revisions in the leased access rules, which it asserted would "plac[e] existing programmers at a substantial competitive disadvantage." Faith & Values Channel is partly owned by a subsidiary of TCI. Broadcasting & Cable, May 13, 1996, at 52.

Commission's "going-forward" regulations[38] -- which were proposed and established well __after__ leased access programmers sought reconsideration of the now concededly inadequate implicit fee formula.

Moreover, a desire to reward cable operators for their programming initiatives under the Commission's going-forward rules cannot supplant the statutory preference for promoting diversity and competition in the delivery of video programming through leased access. __See__ 47 U.S.C. 532(a). Nor does it serve the public interest. Many cable networks generate very little subscribership or revenue for cable operators.[39] At bottom, providing for a transition period would merely allow such unpopular programmers to avoid competing with others willing to

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[38] __See__ __Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation__, Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, 10 FCC Rcd. 1226 (1994), __recon.__ 10 FCC Rcd 3225 (1995). Rather than acting on the petitions for reconsideration of the leased access provisions filed by ValueVision and others, the Commission promulgated the going-forward rules to promote the expansion of cable operators' programming services.

[39] __See__, __e.g.__, Richard Katz, __Cable Ratings Continued to Soar in 1Q__, Multichannel News, Apr. 1, 1996, at 16 (indicating the low ratings of such networks as Nostalgia and the TV Food Network); Richard Katz, __Two Launches in Contrast: TV Land and Ovation__, Multichannel News, Apr. 29, 1996, at 66; __Launches Still Risky: Cable Networks Say They Got Big Boost From Going-Forward Rules__, Communications Daily, Jan. 25, 1995, at 4 (reporting the need to develop merchandising and other program-related businesses in order to keep new networks afloat).

pay the same rates for carriage.[40/] Experience with the implementation of the must-carry rules suggests that popular affiliated programming networks will survive.[41/] Moreover, affiliated programmers will continue to benefit from strong financial backing.[42/] Permitting leased access programmers to present viable competition to existing programming will best fulfill the Commission's ultimate goal of enhancing consumer welfare.

In sum, there is no legitimate reliance interest at issue here. As the Commission recognizes, operators and programmers have "assume[d] the risk" that the programmers would be bumped. Notice ¶ 99. Statutory provisions and Commission decisions have put operators and programmers on clear notice of the requirements of leased access.[43/] Indeed, the Commission

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[40/] See Ex Parte Presentation of E!, MM Docket No. 92-266 (Mar. 13, 1996) (claiming that a change in the leased access rate formula would place E! "at an unfair disadvantage" and that "[a]s a 'newer' network, E! is at a particular risk of displacement by leased access programmers").

[41/] In seeking to enjoin the must carry regulations, cable operators identified stations -- including The Cartoon Network, The Discovery Channel, The Family Channel, and Black Entertainment Television -- that they said would be destroyed by the rules. See Application for an Injunction Pending Appeal at 17-18, Turner Broadcasting System, Inc. v. Federal Communications Commission, 113 S. Ct. 1806 (1993) (No. A-798). These channels continue to thrive. See Katz, Richard, "Cable Ratings Continued to Soar in 1Q," Multichannel News, Apr. 1, 1996, at 16.

[42/] See, e.g., Wayne Walley, Time Is Now for New Cable Networks, Electronic Media, Apr. 22, 1996, at 1-2.

[43/] The Communications Act provides that programmers and operators using channels designated for leased access may only continue such use until a person unaffiliated with the operator (continued...)